

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES WHEATON,

Petitioner,

v.

JACK PALMER, et al.,

Respondents.

Case No. 3:12-cv-00313-MMD-VPC

ORDER

This habeas matter comes before the Court on petitioner's motion (dkt. no. 5) for leave to file a motion for stay and abeyance and his motion (dkt. no. 14) for leave to file supplemental exhibits. No opposition has been filed to either motion.

The motion for leave to file a motion for stay and abeyance was filed in the interim between the issuance of the order directing a response to the petition and respondents' counsel's filing of a notice of appearance. While the title of the motion refers to a request for leave to file a motion for a stay, the body of the brief motion requests an order staying the action so that petitioner may exhaust unspecified claims in the state courts. The certificate of service on the motion reflects that the motion was served by mail on the Attorney General in the interim prior to the filing of a notice of appearance by the Deputy Attorney General assigned to the case. This manner of service of motions during that interim period is provided for in the Court's response order. (See dkt. no. 3, at 2-3.)

1 The motion is unopposed and, accordingly, will be granted pursuant to Local
2 Rule LR 7-2(d), subject to the remaining provisions herein. Any doubt as to whether
3 respondents' counsel was aware of the motion is eliminated by the motion to dismiss
4 wherein counsel expressly refers to the motion. (Dkt. no. 7, at 7.) The Court is aware
5 that respondents' motion to dismiss does not raise any issue as to exhaustion.
6 However, the cited local rule clearly states that "[t]he failure of an opposing party to file
7 points and authorities in response to any motion shall constitute a consent to the
8 granting of the motion." Given that respondents have not opposed a motion of which
9 their counsel clearly was aware, and further given that successive-petition rules limit a
10 petitioner generally to only one federal petition presenting exhausted claims, the motion
11 seeking a stay will be granted.

12 The motion for leave to file supplemental exhibits also is unopposed and will be
13 granted.

14 The Court previously has informed counsel with the Attorney General that Local
15 Rule LR 7-2(d) applies fully to motions filed by *pro se* petitioners in habeas matters.
16 The Court has specifically rejected the proposition that counsel with the Attorney
17 General need respond to *pro se* motions only in their discretion. The Court further has
18 informed counsel with the Attorney General that if counsel continue a practice of not
19 responding to such motions, "they do so at the peril of – among other things – having
20 unopposed motions granted pursuant to the local rule." See *Cristobal Morales v. E.K.*
21 *McDaniel*, No. 2:04-cv-01480-RLH-LRL, Dkt. No. 53 (D.Nev., June 2, 2008).

22 IT IS THEREFORE ORDERED that petitioner's motion (dkt. no. 5) for leave to
23 file a motion for stay and abeyance is GRANTED, as further specified in the provisions
24 below.

25 IT IS FURTHER ORDERED that petitioner's motion (dkt. no. 14) for leave to file
26 supplemental exhibits is GRANTED in connection with the exhibits submitted with the
27 motion. The Court's grant of the motion does not constitute an express or implied
28 holding as to the admissibility or relevancy of the exhibits.

1 IT IS FURTHER ORDERED that this action is STAYED pending the pursuit of
2 additional state judicial remedies. Petitioner may move to reopen the matter following
3 further exhaustion, and any party otherwise may move to reopen the matter at any time
4 and seek any relief appropriate under the circumstances. The reopened matter will
5 proceed under the current docket number.

6 IT IS FURTHER ORDERED that the grant of a stay is conditioned upon petitioner
7 filing, if same is not already pending, a state post-conviction petition or other appropriate
8 proceeding in state district court within forty-five (45) days of entry of this order and
9 returning to federal court with a motion to reopen within forty-five (45) days of issuance
10 of the remittitur by the Supreme Court of Nevada at the conclusion of all state court
11 proceedings.¹

12 IT IS FURTHER ORDERED that, with any motion to reopen filed following
13 completion of all state court proceedings pursued, petitioner: (a) shall attach
14 supplemental exhibits containing the new state court pleadings and the state court
15 written decisions thereon; and (b) if petitioner intends to amend the federal petition,
16 shall file a motion for leave to amend along with the proposed verified amended petition
17 or a motion for extension of time to move for leave.²

18 IT IS FURTHER ORDERED that respondents thereafter shall have thirty (30)
19 days to file a response to a motion to reopen and accompanying motions. The Court
20 will re-screen the matter if the action is reopened, and the Court will issue a scheduling
21 order after it has been determined, *inter alia*, whether the pleadings will be amended
22 following the stay.

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26 ¹If *certiorari* review will be sought or thereafter is being sought, either party may
27 move to reinstate the stay for the duration of any such proceedings. *Cf. Lawrence v.*
Florida, 549 U.S. 327, 335 (2007).

28 ²No claims in the current pleadings are dismissed by this order.

1 IT IS FURTHER ORDERED that respondents' motion (dkt. no. 7) to dismiss is
2 DENIED without prejudice to the reassertion of any and all defenses then applicable
3 following the stay, following upon a scheduling order directing a response.

4 IT IS FURTHER ORDERED that the Clerk of Court shall ADMINISTRATIVELY
5 CLOSE this action until such time as the Court grants a motion to reopen the matter.

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7 DATED THIS 8th day of January 2013.

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11 MIRANDA M. DU
12 UNITED STATES DISTRICT JUDGE
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